IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.1132 OF 1999
IN
NOTICE OF MOTION NO.2813 OF 1997
IN
SUIT NO.3490 OF 1997

1. Mani K. Shah,)

2. Abhayakumar Shah,)
of Bombay, Inhabitant,)
having their residing address)
at 922, Chatti Galli,)
Solapur Maharashtra State.).. Appellants
(Org.Deft.1 & 2)

Versus

1. Satnam Apartments Ltd.,)
a Public Limited Company)
registered under the)
provisions of the Companies)
Act, 1956 having its)
Registered Office at 93,)
Cuffe Parade, Colaba,)
Mumbai - 400 005.)

2. Kantilal S.Shah,)
of Bombay Inhabitant, having)
his address at 922,)
Chatti Galli, Solapur,)
Maharashtra Sate.)

3. Bombay Gas Company Ltd.,)
also a Public Limited Company)
having its Registered Office).. Respondents
at Empire House, Amrut) (No.1-Org.Plff.,
Keshav Nayak Marg,) Nos.2 & 3-Org.
Mumbai - 400 001.) Deft Nos.3 & 4.)

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Shri Madhav J. Jamdar for the appellants.

Shri Girish Desai i/b Ms Geeta Shastri for the respondent No.1.

Shri Atul Damle for the respondent No.3.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 21ST APRIL, 2007

ORAL JUDGMENT: (Per D.G.KARNIK, J)

1. By this appeal the appellants, who are defendant Nos.1 and 2 in the suit, take exception to the order dated 29th April, 1998 passed by the learned Single Judge in Notice of Motion No.2813 of 1997 in Suit No.3490 of 1997.

2. For the sake of convenience, the parties are hereinafter referred to by their original status in the suit.

3. The plaintiff is a company registered under the provisions of the Companies Act, 1956 and defendant Nos.1 and 2 are its members and are flat holders. It appears that the company is formed by the flat holders in the building and one of the objects of the company is to look after the maintenance of the building. All members pay the maintenance charges to the plaintiff.

4. The defendant Nos.1 and 2, who are the owners of the flat are not personally occupying the flat but have let it out to defendant No.4. The defendant Nos.1 and 2 have filed a suit for eviction of defendant No.4 in the Small Cause Court, Mumbai, but we are concerned for the said litigation in this appeal.

5. According to the plaintiff, in addition to the maintenance charges it is entitled to recover from the members/ flat holders the defendant Nos. 1 and 2 are liable to pay certain additional money on account of non occupancy charges that is to say the charges on account of letting out/giving on licence the flat by defendant Nos.1 and 2. Alleging that the defendant Nos.1 and 2 has not paid the maintenance as well as non occupancy charges the plaintiff filed a suit for recovery of the maintenance and the non occupancy charges. During the pendency of the suit, maintenance charges have been paid and regular monthly maintenance charges are also being paid. However, the defendants dispute the liability for payment of non occupancy charges which are in addition to the regular maintenance charges. The defendants have therefore refused to pay the non occupancy charges.

6. In the suit, the plaintiff took out a motion for an order directing the defendants to make payment of maintenance as well non occupancy charges and for an order of injunction restraining the defendants from transferring the flat till disposal of the suit. As stated earlier, presently there is no dispute regarding payment of maintenance charges. In the impugned order, the Learned Single Judge has noted that the defendant Nos.1 and 2 have disputed their liability for payment of non occupancy charges. However, thereafter the Learned Single Judge only observed: "with reference to the aforesaid clauses of the Articles of Association, when I have come to a prima facie conclusion that this is a liability required to be borne by the defendant Nos.1 and 2, it is obvious that they shall have to pay the same at least from the date of filing of the suit .....". In our considered view this prima facie conclusion could not have been arrived at when the defendants had specifically disputed the liability to pay non occupancy charges. Furthermore, directing to pay non occupancy charges during the pendency of the suit would virtually amount to finally decreeing the suit even before the trial. in our view, an order for payment of non occupancy charges could not have been passed at an interlocutory stage.

7. The Learned Single Judge, by the impugned order, further restrained the defendants from transferring their flat. It may be noted that no application was made under Order 38 Rule 5 of the Code of Civil Procedure. There are no averments justifying passing of any order restraining the defendants from transferring the flat. Under Section 6 of the Transfer of Property Act, every property is transferable and no restriction on the right of the defendants to transfer the property could have been placed in the absence of any ground for restraining the defendants from transferring the flat.

8. In the circumstances, the appeal is allowed and the impugned order is set aside. We clarify that this order does not prevent the plaintiff from taking any appropriate proceeding in future, if any ground for it arises in future.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)